SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1944

No. 953

JOHN F. X. FINN, AS TRUSTEE OF CHILDS COMPANY, PETITIONER,

vs.

BURTON C. MEIGHAN, JR., AS SUBSTITUTED TRUSTEE UNDER THE LAST WILL AND TESTAMENT OF WILLIAM T. WOOD, DECEASED

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

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[fol. 1]

IN UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

In the Matter of CHILDS COMPANY, Debtor

In Proceedings for Reorganization under Chapter X of the Bankruptcy Act—No. 82,868

BURTON C. MEIGHAN, JR., as Substituted Trustee under the Last Will and Testament of William T. Wood, Deceased, Petitioner-Appellee,

against

JOHN F. X. FINN, as Trustee of Childs Company, Respondent-Appellant

STATEMENT UNDER RULE XIII

This appeal is from an Order dated September 27, 1944, entered on October 2nd, 1944, by Hon. Edward A. Conger, in the United States District Court for the Southern District of New York, in voluntary proceedings for the reorganization of Childs Company under Chapter X of the Chandler Act. The Order appealed from granted the petition of Burton C. Meighan, Jr., as Substituted Trustee [fol. 2] under the Last Will and Testament of William T. Wood, Deceased, verified June 27, 1944, praying for an order adjudging that the term granted to Childs Company, the Debtor herein, by an indenture of lease dated July 31, 1922, as modified in certain respects by an agreement dated March 23, 1942, has terminated and come to an end, and further that the Trustee of the Debtor be ordered forthwith to surrender possession of the premises 1553 Broadway, New York City, to said Burton C. Meighan, Jr., Trustee as aforesaid.

Said petition of Burton C. Meighan, Jr., Trustee as aforesaid, by order to show cause dated July 6, 1944, was heard on July 25, 1944, and referred by Order of the United States District Court, dated July 26, 1944, to Hon. Robert P. Stephenson, as Special Master, to hear the proofs and arguments of the parties and to report his findings of fact and conclusions of law thereon. Said Robert P. Stephenson filed his Report as Special Master, including opinion and

findings of fact and conclusions of law, with the Clerk of the United States District Court on August 7, 1944, and recommended the granting of the petition of Burton C. Meighan, Jr., as Substituted Trustee as aforesaid, verified June 27, 1944.

The Order appealed from confirmed the said Report of the Special Master and adopted the Special Master's findings of fact and conclusions of law, and adjudged that the term granted the Childs Company by indenture of lease dated July 31, 1932, as modified in certain respects by an agreement March 23, 1942, covering the premises known as and by 1553 Broadway, Borough of Manhattan, New York City, came to an end and terminated on August 26, 1943, and directed John F. X. Finn, as Trustee of Childs Company, to surrender possession of said premises within thirty days from September 27, 1944, to said Burton C. Meighan, Jr., Substituted Trustee as aforesaid.

[fol. 3] On August 26, 1943, Childs Company filed in the United States District Court for the Southern District of New York a petition for voluntary proceedings for reorganization under Chapter X of the Bankruptcy Act. On the same day an order was made by the Hon. Edward A. Conger, approving said petition of the Debtor and appointing John F. X. Finn as trustee thereof.

In the aforesaid proceeding in the United States District Court for the Southern District of New York, Lorenz, Finn & Lorenz, Esqs., appeared for John F. X. Finn, as Trustee of Childs Company, the appellant herein, and Meighan & Necarsulmer, Esqs., appeared for Burton C. Meighan, Jr., as Substituted Trustee under the Last Will and Testament of William T. Wood, Deceased, the appellee. There has been no change of parties or attorneys since the commencement of this proceeding.

John F. X. Finn, as trustee of the debtor herein, the aggrieved party on this appeal from the Order of the District Court, dated September 27, 1944, filed notice of appeal therefrom on October 4, 1944, with the Clerk of the United States District Court for the Southern District of New York.

[fol. 4] IN UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK

[Same Title]

ORDER TO SHOW CAUSE

Upon the annexed petition of Burton C. Meighan, Jr., Substituted Trustee under the Last Will and Testament of William T. Wood, Deceased, verified June 27, 1944, and sufficient reason appearing therefor, it is

Ordered that John F. X. Finn, trustee of the debtor herein, the debtor, and Securities and Exchange Commission show cause before me at Room 2003, United States Courthouse, Foley Square, Borough of Manhattan, City of New York, on the 18th day of July, 1944, at 10:30 o'clock in the forenoon, or as soon thereafter as counsel can be heard, why an order should not be granted herein:

1. Adjudging that the term granted by a certain indenture of lease dated July 31, 1922, made by and between Gramway Company, Inc., as landlord, and Childs Company, as tenant, and as modified in certain respects by an agreement dated the 23rd day of March, 1942, made by and between Burton C. Meighan, Jr., as Substituted Trustee under the Last Will and Testament of William T. Wood, Deceased (the successor of all the rights and privileges of the Gramway Company, Inc.), as landlord, and Childs Company, as tenant, has terminated and come to an end;

2. Authorizing and directing John F. X. Finn, as trustee of the debtor herein, and the said debtor to forthwith sur- [fol. 5] render possession of premises located at and known as 1553 Broadway, Borough of Manhattan, City, County and State of New York, to said Burton C. Meighan, Jr., as Substituted Trustee as aforesaid;

3. Granting to said petitioner such other and further relief as to the Court may seem proper in the premises; and it is further

Ordered that service of a copy of this order and of the petition upon which the same is based upon Lorenz, Finn & Lorenz, Esqs., attorneys for the trustee, George Zolotar, Esq., attorney for the Securities and Exchange Commission, and Barber & Grunden, Esqs., attorneys for the debtor, per-

sonally or by mailing on or before the 12th day of July 1944, shall be deemed sufficient for the purpose of this application.

Dated: July 6th, 1944, New York City.

Edward A. Conger, United States District Judge.

[fol. 6] IN UNITED STATES DISTRICT COURT

[Same Title]

PETITION

Hon. Edward A. Conger, Judge of the United States District Court for the Southern District of New York:

The petition of Burton C. Meighan, Jr., as Substituted Trustee under the Last Will and Testament of William T. Wood, Deceased, respectfully shows:

I. That your petitioner resides at No. 21 Hazel Lane, Larchmont, Town of Mamaroneck, County of Westchester and State of New York.

II. That on the 17th day of March, 1930, one William T. Wood died a resident of the City, County and State of New York, leaving a Last Will and Testament dated the 18th day of August, 1925, and that said Last Will and Testament was duly admitted to probate in the Surrogate's Court of the County of New York on May 3rd, 1930. That in and by the terms and provisions of the said Last Will and Testament Larchmont National Bank and Trust Company and Burton C. Meighan, designated as executors and trustees in said will, duly qualified as such executors and trustees and entered upon their duties and continued to act as such until February 6th, 1933, when the said Burton C. Meighan died and that thereafter the Larchmont National Bank and Trust Company continued as surviving executor and trustee until August 5, 1933, when it was declared insolvent and put in the hands of a receiver; that thereafter, pursuant to [fol. 7] a judgment of the Supreme Court of the State of New York, County of Westchester, your petitioner was duly appointed substituted trustee under the said Last Will and Testament of William T. Wood, Deceased, and that your petitioner herein, pursuant to the said judgment, did duly qualify as said substituted trustee and is still qualified and continues to act as said substituted trustee as aforesaid.

III. That by an indenture of lease dated July 31, 1922, petitioner's predecessor in interest, Gramway Co. Inc., a New York corporation, leased to the debtor the land and building located at and known as 1553 Broadway, Borough of Manhattan, City, County and State of New York, for a term of twenty-one (21) years commencing May 1, 1926, to and including April 30, 1947, and thereafter, upon the terms and conditions therein set forth at the option of the debtor for a further term of twenty-one (21) years. By the said lease the debtor agreed to pay the landlord a net rental of Thirty thousand ($30,000.00) per year and, in addition, to pay taxes, insurance premiums and various other expenses of maintenance and operation.

IV. That paragraph 4 of the said lease provided:

"Conditional Limitation

4. The tenant covenants that if the rent reserved by this lease or any part thereof shall remain unpaid for more than ten days after written notice that it has become due or if the tenant shall fail to perform any of the covenants, conditions, provisions, and agreements herein contained, or, if a petition in bankruptcy shall be filed by the tenant or if the tenant shall be adjudged bankrupt or insolvent by any Court, or if a [fol. 8] trustee in bankruptcy of the tenant shall be appointed in any suit or proceeding brought by or against the tenant, then and in each and every such case, the term hereby granted shall immediately cease, determine and come to an end, and the landlord may recover and resume possession of the demised premises by any legal means."

A copy of the said lease and a copy of the agreement hereinafter mentioned by which the said lease was modified in certain respects will be submitted on the hearing of this application.

V. Thereafter the petitioner succeeded to all the rights and privileges of the Gramway Company, Inc., the aforesaid lessee, and that your petitioner became and still is the owner of the said premises located at and known as 1553 Broadway, New York City.

VI. That thereafter by an agreement between petitioner and the debtor, dated March 23, 1942, the aforesaid lease

was modified in certain respects, including a reduction of the rental upon conditions therein specified, which said agreement contained the following clause:

> "First. This agreement shall be of no force and effect and shall be null and void in any of the following events:
>
> "a) That a petition in bankruptcy or for reorganization under the Bankruptcy Laws of the United States shall be filed by the Tenant on or before April 30th, 1944;
>
> "b) That the Tenant make an assignment for the benefit of creditors or take advantage of any other insolvency statute or other statutes for the relief of debtors on or before April 30th, 1944;
>
> [fol. 9] "c) That should any petition in bankruptcy or for reorganization under the Bankruptcy Laws be filed against the Tenant on or before April 30th, 1944, the same shall not have been removed and any such proceeding dismissed or discontinued within thirty (30) days from the filing thereof;
>
> "d) That should a receiver or trustee for the Tenant's property be appointed, such receiver or trustee shall not have been removed in any proceeding connected therewith, dismissed or discontinued within thirty (30) days from the appointment of such receiver or trustee;
>
> and upon the occurrence of any of the foregoing events the Landlord shall be entitled to each and all of his rights as set forth in the Lease giving credit on his account, however, for all sums theretofore received."

VII. That on or about the 26th day of August, 1943, the debtor filed its petition herein for reorganization under Chapter X of the Bankruptcy Law. On the same date this Court appointed John F. X. Finn as trustee of the debtor. That thereupon the said trustee did enter upon and take possession of the aforesaid premises and has ever since remained and still remains in possession and control of the said premises and that the said trusteeship has not been vacated and the said bankruptcy proceedings have not been dismissed or discontinued.

VIII. That although petitioner has given due notice to the debtor and to the debtor's trustee of the cancellation and termination of the aforesaid lease pursuant to the terms thereof and has demanded possession of said premises, the said trustee refuses to surrender said possession and still remains in possession and control thereof.

[fol. 10] IX. That petitioner has leased the said premises to another tenant desiring immediate possession thereof and that substantial loss and damage will be suffered by petitioner by reason of his inability to give such possession unless the trustee and debtor forthwith surrender possession and control of said premises to petitioner.

X. That no other application has been made to this Court for the relief herein requested.

Wherefore petitioner prays that an order be made adjudging that the term granted by the aforesaid lease and all rights of the debtor and trustee therein have terminated and come to an end and that the debtor and its trustee be ordered forthwith to surrender possession of the said premises to petitioner and that a hearing be held upon this application upon such notice as the Court may direct and for such other and further relief in the premises as may be just and proper.

Dated: June 27, 1944.

Burton C. Meighan, Jr., As Substituted Trustee under the Last Will and Testament of William T. Wood, Deceased, Petitioner.

(Verified June 27, 1944.)

[fol. 11] In United States District Court

[Same Title]

Affidavit of Joseph Lorenz in Opposition to Petition

State of New York,
County of New York, ss:

Joseph Lorenz, being duly sworn, deposes and says:

I am a member of the firm of Lorenz, Finn & Lorenz, attorneys for the Trustee herein.

This affidavit is submitted in opposition to the petition of (a) The 415 Fifth Avenue Corporation, verified the 5th

day of July, 1944, and (b) the petition of Burton C. Meighan, Jr., Substituted Trustee under the Last Will and Testament of William T. Wood, Deceased, verified June 27, 1944. The petitioners are the respective owners of premises 1551 Broadway and 1553 Broadway, New York. They request that this Court adjudge that the terms of the leases of the Debtor upon the premises 1551 and 1553 Broadway, New York, and all rights of the Debtor and Trustee therein, have terminated and that the Trustee be ordered to surrender said premises to the petitioners.

The Debtor, and since his appointment, the Trustee, have operated a restaurant on these contiguous properties.

The premises at 1551 Broadway were leased by the Debtor by an Indenture of Lease dated May 19, 1931, at a net rental of $49,000 per year, plus taxes, insurance premiums, and other similar items. The expiration date was May 1, 1947. Paragraph 2 of said lease contained the following provision:

> "If during the term hereby demised the Lessee file a petition in bankruptcy or be adjudicated a bankrupt [fol. 12] or make a general assignment or take the benefit of any insolvent act, or if a Receiver or Trustee be appointed for the Lessee's property, and such Receivership or Trusteeship shall not be vacated within thirty (30) days after the appointment of such officers, then in any of those events the Lessor may at its option cancel and terminate this Lease and upon the exercising of such option this Lease shall thereupon come to an end and be of no further force or effect and shall not pass by operation of law, and the Lessor shall have the right immediately to take possession by force or otherwise or institute any proceedings for the purpose of obtaining such possession."

This lease was modified by an agreement between The 415 Fifth Avenue Corporation and the Debtor dated May 1, 1941. The modification agreement, in paragraph First thereof, contained a provision that it should be null and void if "a petition in bankruptcy or for reorganization under the Bankruptcy Laws of the United States shall be filed by the lessee on or before April 30, 1944." It also provided that the minimum rental payable under the original lease should be reduced for the period from May 1,

1941 to May 1, 1947 to $36,000 per annum, plus taxes, insurance premiums and similar items, and also a sum equal to 6.2025% of the amount by which gross sales in the demised premises during each of said years should exceed the sum of $564,280.

The modification agreement with respect to 1551 Broadway, also provided that the expiration date of the lease be extended from May 1, 1947 to May 1, 1957, subject, however, to the following terms and conditions: at any time prior to February 1, 1946, the lessor might give notice to the lessee that it cancelled and revoked the ex- [fol. 13] tended term beyond May 1, 1947; the minimum annual for the extended period (exclusive of percentage rent and taxes and insurance payments) should be at least $35,000; that said annual minimum rent for the extended period should be equal to at least 6% of the value of the premises as of February 1, 1946, but not less than $35,000 per annum; that if the parties were unable to agree upon the minimum rent as represented by 6% of the value of said premises, it was to be determined by appraisers appointed by the parties; that despite the decision of said appraisers, the lessor, nevertheless, had the right on or before August 1, 1946, if it did not like the appraisers' determination, to cancel, and to refuse to extend the term beyond May 1, 1947.

The lease of the premises 1553 Broadway, dated July 31, 1922, provided that it was to expire on April 30, 1947, at a net rental to the landlord of $30,000 per annum and taxes, insurance premiums and similar items. It contained a provision in paragraph 4 thereof as follows:

> "The tenant covenants that if the rent reserved by this lease or any part thereof shall remain unpaid for more than ten days after written notice that it has become due or if the tenant shall fail to perform any of the covenants, conditions, provisions, and agreements herein contained, or if a petition in bankrupty shall be filed by the tenant or if the tenant shall be adjudged bankrupt or insolvent by any Court, or if a trustee in bankruptcy of the tenant shall be appointed in any suit or proceeding brought by or against the tenant, then and in each and every such case, the term hereby granted shall immediately cease, determine and come to an end, and the landlord may recover and resume

possession of the demised premises by any legal means."

[fol. 14] This lease was modified by an agreement between the landlord and the Debtor, dated March 23, 1942, whereby the annual fixed rent was reduced to $22,041.11 per annum until April 30, 1947, plus a percentage rent of 3.7975% of the amount by which gross sales in the demised premises should exceed the sum of $564,280. The modification agreement contained a clause to the effect that:

"First: This agreement shall be of no force and effect and shall be null and void in any of the following events: (a) That a petition in bankruptcy or for reorganization under the Bankruptcy Laws of the United States shall be filed by the Tenant on or before April 30, 1944 * * *"

Said modification agreement also provided for an extension of the lease to May 1, 1957, subject, however, to the following provisions: that any time prior to February 1, 1946, the landlord might give notice to the tenant that he cancelled and revoked the extended term beyond April 30, 1947; that the minimum rent (exclusive of percentage rent, taxes and insurance, etc.) for the extended period should be a sum equal to 6% of the value of the demised premises, but in no event less than the annual rent abovementioned; that if the parties could not agree upon such minimum rent, it was to be determined by appraisers; that such appraisal was to be binding upon the parties (but not less than the abovementioned sum), but with the same extraordinary provision as appears in the modification agreement covering 1551 Broadway that the landlord nevertheless had the right at any time on or before August 1, 1946, notwithstanding such appraisal, to notify the tenant that there should be no extension of the lease and that it should finally cease and terminate on April 30, 1947.

As the leases with respect to 1551 Broadway and 1553 Broadway are entirely separate, and each landlord has the [fol. 15] right to act independently of the other, it is possible under these provisions of the modification agreements, that one of said landlords should exercise the right to cancel the extension of his lease so as to terminate it in 1947, while the other landlord might not cancel the extension in his lease. Accordingly, although the premises

have been and are operated as a single unit, the Debtor might be left with only one of the two parcels.

Shortly after the appointment of the Trustee, numerous conferences were had by the Trustee, the officers of the Debtor, your deponent and other interested parties, with respect to the policy to be pursued in connection with the leases covering the combined premises. At the Trustee's request, a comprehensive analysis of the operations of the Debtor in said premises over a ten year period was prepared. This analysis disclosed, in the opinion of the Trustee and the officers of the Debtor, that the combined rent paid for the premises was excessive from the point of view of a long term lease not expiring until 1957. The rent, even under the modified leases, taking into consideration the taxes and insurance payable by the Debtor, and after deducting all net income received from the buildings, other than the restaurant, amounts to almost $73,000 per annum.

On the basis of the average sales of the restaurant during the period 1934-1942 inclusive, this rent of $73,000 represented in excess of 19% of total sales. Even on the basis of sales for the year August 1, 1942 to July 31, 1943, the percentage of the rent to the total sales was close to 14%. Although operations for the years 1942 and 1943, and current operations are highly profitable, in the year 1938, the Debtor suffered a loss of $10,727 in the operation of the premises; in 1939, a profit of $406 was made; in 1940, a loss of $11,493 was incurred; in 1941 a profit of $12,319 was made. Thereafter, largely as a result of un- [fol. 16] usual conditions in the Times Square area, the profits have greatly increased.

It should be noted further that during the period from 1934 to 1943 inclusive, labor costs, which constitute a large portion of restaurant operating costs, almost doubled in amount. A considerable part, moreover, of the profits from the operation of the restaurant arises from liquor sales, which have had a pronounced increase in volume during the last two years. As is well known, there was a serious question in the latter part of 1943 and the early part of 1944 as to whether liquor would be available in sufficient quantities to meet requirements. This constituted another hazard in connection with assumption of the modified lease for the full term upon the terms thereof.

After various discussions between the Trustee, the Debtor's officers, the Trustee's counsel, and other interested parties, it was decided to endeavor to obtain a reasonable modification in the terms of said leases; and deponent was instructed by the Trustee to proceed with such negotiations.

Accordingly, on December 6, 1943, deponent had a conference with Messrs. Lowell Birrell and Herbert Birrell, representing the owners of 1551 Broadway. Although these gentlemen stated that they did not represent the owner of the premises at 1553 Broadway, deponent was advised that the respective owners were cooperating with respect to their properties and that the owner of 1553 Broadway would be kept informed as to the views expressed. At this meeting deponent, on behalf of the Trustee, requested a reasonable reduction in rent, emphasizing particularly the high ratio of fixed rent to sales, the greatly increased labor costs, and the probable lack of permanence in the then current operating results in the light of the record in the restaurant over a long term period and during normal times. Mr. Lowell Birrell stated that he would take the matter up with the interested parties and would advise deponent of their views.

[fol. 17] Deponent heard nothing from Mr. Birrell until January 27, 1944, when Mr. Lowell Birrell telephoned deponent and stated that a meeting of the Board of Directors of the owner of 1551 Broadway had been held, and that said Board of Directors desired to know forthwith whether the Trustee would assume the lease of the premises upon the terms specified in the modified lease. A conference was arranged for the following day at which the matter was to be discussed. In the meantime, deponent conferred with respect to the situation with the Trustee, the officers of the Debtor, representatives of the Securities and Exchange Commission, and others interested. The Trustee also obtained an appraisal of the leasehold by Mr. Francis K. Stevens of Brown, Wheelock, Harris, Stevens, Inc. Mr. Stevens appraised the fair net rental value of the entire property—namely, the two leaseholds—at $35,000 net per annum, as against the sum of approximately $58,000 net rental, payable under the modified leases (exclusive of taxes, etc.). All parties with whom deponent discussed the matter agreed that, if possible, a modification of the leases should be effected whereby the fixed minimum

rent should be reduced to a reasonable level from the point of view of a long term lease, but that the landlords should be offered, in addition to the fixed minimum rent, an advantageous "percentage rental" based on sales so that in periods when the business of the Debtor justified it, the landlords would receive at least as much and probably more than they were then receiving, but in periods of recession, the Debtor would be protected by being required to pay only a reasonable fixed minimum.

On the following day, January 28, 1944, Mr. Herbert Birrell, a partner of Mr. Lowell Birrell, came to the appointed conference, stating that his brother had been called to Washington and would not be able to attend. There was also present Mr. Kenneth LaBarre, a Vice President of the Debtor. Mr. Birrell asked whether the [fol. 18] Trustee would advance a sufficient sum to pay taxes accrued against the respective premises. To this deponent readily consented, and such advances were shortly thereafter made. The parties at the meeting thereupon proceeded to discuss the subject matter for which the meeting had been arranged—the request of the landlord as transmitted to the deponent for immediate decision as to whether the Trustee would assume the leases.

Deponent thereupon stated that, in his opinion, a satisfactory solution of the problem would be to reduce the fixed minimum provided for in the leases and to supplement the same by a favorable percentage rental which would net the landlords in prosperous times even more than they were entitled to receive under the modified leases, but that the tenant would be protected by the obligation to pay only a reasonable minimum rental during less favorable periods. Mr. Birrell stated that he thought the suggestion was a good one, that personally he favored leases of such a character, but that, of course, he was not authorized to accept such a proposal without taking it up with his principals. He stated, however, that he would take the matter up with his principals and would shortly advise deponent. Deponent promptly informed the Trustee, the Debtor's officers, and representatives of the Securities and Exchange Commission of this proposal made to Mr. Birrell and his comments and reaction thereon.

Thereafter, on January 31, 1944, February 2, 1944, and February 7, 1944 deponent had discussions on the telephone with Mr. Herbert Birrell with respect to payments

on account in connection with use and occupation. At one of these discussions, deponent asked Mr. Birrell what the attitude of his client was with respect to the proposal made at the conference on January 28th; and requested a further conference at which, if possible, an [fol. 19] agreement could be consummated. Mr. Birrell said that it was not possible to arrange a meeting at that time as his brother Lowell Birrell, was in, or was going to go to Chicago, and would be away for approximately ten days; he stated further that the question of whether or not a lease in which the payment of percentage rent played an important part, would be acceptable, would depend in large part on what the management of the Childs Company would be upon reorganization; and as some time would necessarily elapse before reorganization could be effected, he thought it would be preferable to wait until the reorganization was further along before coming to a decision. He stated further that by virtue of these facts there was no necessity of any hurry in coming to a conclusion. He stated, further, that he would subsequently communicate with deponent with respect to this matter.

No further word was received from either of the landlords or their attorneys until March 20, 1944 when Mr. Lowell Birrell telephoned deponent threatening to cancel the lease on 1551 Broadway. A conference was arranged for March 23, 1944, at which there were present Mr. Lowell Birrell, Mr. Herbert Birrell, Mr. LaBarre and deponent. Mr. Birrell threatened cancellation of the lease and asked whether the Trustee would give up the premises. Deponent stated that in his opinion the Trustee would not surrender the premises in view of the current favorable operating results, and stated further that in his opinion, the respective landlords had waived any right they might have to cancel their leases by virtue of the long period of time which had elapsed since the appointment of the Trustee. Deponent also mentioned the conversation he had had with Mr. Herbert Birrell on January 28, 1944 with respect to a lease with a liberal percentage clause, and the subsequent telephone conversations with him as above related.

Notwithstanding that deponent had expressed the view at the conference on March 23, 1944 that the lapse of time [fol. 20] had constituted a waiver on the part of the landlords of any right they might have to cancel the leases,

no communication was received from either of the landlords or their attorneys with respect to any proposed cancellation for approximately three months, as hereinafter set forth. Accordingly, on May 9, 1944, deponent wrote Mr. Birrell as follows:

> "The Trustee of Childs Company is desirous of assuming the lease at 1551 Broadway, as modified. I trust that this is satisfactory to your client and I would appreciate it, if at your convenience, you would communicate with me in connection with the details to consummate the assumption."

On the same date, a similar letter was written by deponent to the attorneys for 1553 Broadway.

No reply was ever received to either of said letters. Accordingly, on May 31, 1944, the Trustee caused to be sent to the respective lessors checks which, added to the payments for use and occupation theretofore made to them, aggregated the full rent payable to said landlords under their modified leases. These checks were returned by the respective landlords. Still, however, no action was taken by the landlords or notices given of any proposed cancellation until June 23, 1944, when the owner of the premises 1553 Broadway served a written notice upon the Trustee and the Debtor stating that the lease of said premises as modified "has ceased, determined and come to an end by virtue of the bankruptcy proceedings now pending in the United States District Court, Southern District of New York, relating to the said Childs Company * * *", and also demanding that the Trustee and the Debtor vacate said premises. On the same date, a notice was served by the landlord of the premises 1551 Broaway stating that it cancels and terminates the lease with the Childs Company covering said premises, and that agree-
[fol. 21] ment of modification of said lease is null and void. Said notice stated further that "pursuant to provisions of paragraph 2 of said Indenture of Lease dated May 19, 1931, (the landlord) hereby exercises its option to cancel and terminate the lease."

Thereafter the present proceedings were instituted by the respective landlords.

Deponent is unaware when negotiations were commenced by the landlords with the new lessee mentioned in the

respective petitions, but believes that such negotiations were pending at the time of the aforesaid discussions with Mr. Herbert Birrell with respect to the proposed modification of the Debtor's leases so as to provide for a reduced fixed rental and an increased percentage rent. No notice of cancellation was sent by either landlord until June 23, 1944, despite the fact that they knew that deponent contended, as early as March 23, 1944, that any right of the lessors to cancel the respective leases had already been waived by them. Deponent believes that the continued delay was for the sole purpose of enabling the landlords to consummate their new proposed lease while still having the advantage of the Childs Company occupancy of the premises.

Deponent, therefore, submits (a) that the appointment of the Trustee in the present reorganization proceedings is not a ground for cancellation of the lease covering 1553 Broadway, under the terms of said lease; (b) that if such appointment of the Trustee were construed to be a ground for cancellation under said lease, the landlord of said premises has waived his right and is estopped to do so; and (c) that the landlord of premises 1551 Broadway has waived its right to exercise and is estopped from exercising any option to cancel its lease.

Deponent accordingly prays on behalf of the Trustee, that the respective petitions of the landlords of 1551 Broadway and 1553 Broadway be denied.

Joseph Lorenz.

(Sworn to July 24, 1944.)

[fol. 22] IN UNITED STATES DISTRICT COURT

[Same Title]

AFFIDAVIT OF JOHN F. X. FINN IN OPPOSITION TO PETITION

STATE OF NEW YORK,
County of New York, ss:

JOHN F. X. FINN, being duly sworn, deposes and says:

I am the Trustee of the Debtor herein, having been appointed by order of this Court dated August 26, 1943.

I have read the affidavit of Joseph Lorenz, sworn to

July 24, 1944, in opposition to the respective petitions of the owners of premises 1551 Broadway and 1553 Broadway, New York, requesting an adjudication by this Court that the leases covering said premises be terminated and cancelled, and requesting further that deponent be ordered to vacate said premises.

Although, as set forth in the affidavit of Mr. Lorenz, the rent of said respective premises as provided in the modified leases covering them, is excessive from the point of view of a long term lease, and, although, upon assumption, a substantial reserve should be set up out of the present earnings, as a safeguard against possible operating losses in the future, nevertheless, deponent believes that it is to the advantage of the Debtor's estate to assume said leases, as modified, in view of the high current operating profits of the restaurant maintained at that location. It is to be noted, moreover, that the Debtor has a substantial unamortized investment in said premises as of December 31, 1943, of $68,562.

In view of the above facts and those set forth in said affidavit of Mr. Lorenz, deponent respectfully requests that said petitions be denied.

John F. X. Finn.

(Sworn to July 24, 1944.)

[fol. 23] In United States District Court

[Same Title]

Affidavit of Kenneth LaBarre in Opposition to Petition

State of New York,
County of New York, ss:

Kenneth LaBarre, being duly sworn, deposes and says:

I am a Vice President of Childs Company, the Debtor herein.

I have read the affidavit of Joseph Lorenz, sworn to July 24, 1944, in opposition to the petitions of the landlords of the respective premises 1551 Broadway and 1553 Broadway, New York, requesting an adjudication that said leases have been cancelled and terminated, and that the

Trustee herein be ordered to surrender said premises to the petitioners.

I was present at the conference at the office of Mr. Joseph Lorenz held on January 28, 1944, at which there were present Mr. Herbert Birrell, Mr. Lorenz, and deponent. I was also present at the conference at Mr. Lorenz' office held on March 23, 1944, as set forth in his affidavit. At this conference there were present Mr. Lowell Birrell, Mr. Herbert Birrell, Mr. Lorenz and deponent.

Said affidavit of Mr. Lorenz correctly sets forth what transpired at these two conferences.

Kenneth LaBarre.

(Sworn to July 24, 1944.)

[fol. 24] IN UNITED STATES DISTRICT COURT

[Same Title]

ORDER OF REFERENCE IN RE PREMISES 1551-1553 BROADWAY, NEW YORK, N. Y.

The petition of Burton C. Meighan, Jr., Substituted Trustee under the Last Will and Testament of William T. Wood, Deceased, verified June 27, 1944, praying for an order (1) Adjudging that the term granted by a certain indenture of lease dated July 31, 1922, made by and between Gramway Company, Inc., as landlord, and Childs Company, as tenant, and as modified in certain respects by an agreement dated the 23rd day of March, 1942, made by and between Burton C. Meighan, Jr., as Substituted Trustee under the Last Will and Testament of William T. Wood, Deceased (the successor of all the rights and privileges of the Gramway Company, Inc.), as landlord, and Childs Company, as tenant, has terminated and come to an end; and (2) Authorizing and directing John F. X. Finn, as trustee of the debtor herein, and the said debtor to forthwith surrender possession of premises located at and known as 1553 Broadway, Borough of Manhattan, City, County and State of New York, to said Burton C. Meighan, Jr., as Substituted Trustee as aforesaid; and the petition of The 415 Fifth Avenue Corporation, verified July 5, 1944, praying, *inter alia*, for an order adjudging that all rights of the Childs Company and of John F. X.

Finn, Trustee of the Debtor, under an indenture of lease dated May 19, 1931, between the 1551 Broadway Corporation and the Debtor, as modified by agreement dated May 1, 1941, have been terminated, and further that the [fol. 25] Trustee of the Debtor be ordered forthwith to surrender said premises to petitioner, The 415 Fifth Avenue Corporation, having duly come on to be heard on the 25th day of July, 1944, and due notice of said applications having been given as prescribed by this Court in its Orders dated July 6, 1944, and after hearing Meighan & Necarsulmer, Esqs., attorneys for Burton C. Meighan, Jr., as Substituted Trustee, etc., and Birrell & Birrell, Esqs., attorneys for The 415 Fifth Avenue Corporation, in support of the aforesaid applications, and Lorenz, Finn & Lorenz, Esqs., attorneys for the Trustee herein, in opposition thereto, and due deliberation having been had thereon;

Now, upon the petition of Burton C. Meighan, Jr., as Substituted Trustee, etc. and The 415 Fifth Avenue Corporation, the answering affidavit of Joseph Lorenz, sworn to July 24, 1944, the affidavit of John F. X. Finn, as Trustee, sworn to July 24, 1944, the affidavit of Kenneth LaBarre, sworn to July 24, 1944, the reply affidavit of Herbert A. Birrell, sworn to July 25, 1944, and upon all the proceedings heretofore had herein, it is

Ordered, that the issues raised by the petition of Burton C. Meighan, Jr. and the petition of The 415 Fifth Avenue Corporation, the answering affidavit of Joseph Lorenz, sworn to July 24, 1944, the affidavit of John F. X. Finn, as Trustee, sworn to July 24, 1944, the affidavit of Kenneth LaBarre, sworn to July 24, 1944, the reply affidavit of Herbert A. Birrell, sworn to July 25, 1944, be, and the same hereby are, referred to Hon. Robert P. Stephenson as Special Master to hear the proofs and arguments of the parties and report his findings of fact and conclusions of law thereon to this Court with all convenient speed; and it is further

[fol. 26] Ordered, that any party in interest herein be, and he hereby is, granted permission to file appropriate answers with the aforesaid Special Master.

Dated, July 26th, 1944.

Edward A. Conger, U. S. D. J.

[On the hearing before Hon. Robert P. Stephenson, Special Master, the following Answer of Appellant was required to be filed by the said Special Master in connection with said hearing in place of the preceding affidavits.]

[fol. 27] IN UNITED STATES DISTRICT COURT

[Same Title]

ANSWER

John F. X. Finn, as Trustee of Childs Company, Debtor, (hereinafter called the Trustee), answering the petition of Burton C. Meighan, Jr., as Substituted Trustee under the Last Will and Testament of William T. Woods, Deceased, alleges as follows:

1. The Trustee has no knowledge or information sufficient to form a belief as to any of the allegations set forth in paragraphs I and II of the petition.

2. Admits the allegations set forth in paragraphs III, IV and V of the petition.

3. Denies each and every allegation set forth in paragraph VI of the petition, except admits that an agreement was entered into between the petitioner and the Debtor, dated March 23, 1942, modifying the lease mentioned in the petition in certain respects, including the reduction of the rental; admits that said agreement of March 23, 1942 contains the provisions set forth in paragraph VI of the petition; and denies the legality or validity of (a) any provisions in said agreement purporting to render null and void the reduction of rental provided in said agreement of March 23, 1942, in the event that a Petition for Reorganization under the Bankruptcy Laws of the United States should be filed by the tenant on or before April 30, 1944, and (b) the provision in said agreement that in such event the peti- [fol. 28] tioner would be entitled to all his rights under the original lease giving credit only for all sums theretofore received.

4. Admits the allegations set forth in paragraph VII of the petition.

5. Denies each and every allegation set forth in paragraph VIII of the petition, except admits that petitioners on or about June 23, 1944, served a notice upon the Debtor and the Trustee, wherein petitioner purported to notify the Debtor and Trustee of the cancellation and termination of the lease and demanded possession of said premises, and admits that the Trustee refuses to surrender said possession and still remains in possession and control thereof.

6. Denies any knowledge or information sufficient to form a belief as to any of the allegations set forth in paragraph IX of the petition.

And for an affirmative defense, the trustee alleges as follows:

7. At various times since the early part of December, 1943, the Trustee, through his attorneys, has been negotiating with the owners and landlords of the respective premises at 1551 Broadway and 1553 Broadway, New York, with respect to the terms of the respective leases covering said premises. The attorneys for the owner of the premises at 1551 Broadway are Messrs. Birrell & Birrell. The attorneys for the owner of the premises at 1553 Broadway are Messrs. Meighan & Necarsulmer. The negotiations were at all times actually conducted with Messrs. Birrell & Birrell. The Trustee and his attorneys at all times understood that Messrs. Birrell & Birrell were not representing the owner [fol. 29] of premises 1553 Broadway as attorneys, but the Trustee (through his attorneys) was advised by Messrs. Birrell & Birrell in the early part of said negotiations that the respective owners of 1551 Broadway and 1553 Broadway were acting and intended to act in common as their respective premises were utilized as a single restaurant by the Debtor and the Trustee; that the owner of 1553 Broadway relied upon the real estate knowledge, experience, and judgment of the officers and directors of the corporate owner of 1551 Broadway; and that the petitioner herein and his attorneys were being advised of the negotiations occurring from time to time between the attorneys for the owner of 1551 Broadway and Trustee's attorneys. On information and belief, the petitioner and his attorneys were in fact currently advised from time to time of all the negotiations between the Trustee's attorneys and the attorneys for the

owner of the premises at 1551 Broadway, and approved the same.

8. On or about January 27, 1944, Messrs. Birrell & Birrell advised the Trustee, through the latter's attorney, that the owners of 1551 Broadway desired an immediate decision by the Trustee as to whether the Trustee would assume the leases, as modified, of the premises at 1551 Broadway and 1553 Broadway. Thereupon a conference was arranged on January 28, 1944 at which the matter was to be discussed. At said conference, the Trustee by his attorney advised Mr. Herbert Birrell of the above-mentioned firm, that, if possible, the Trustee should like to have the leases on said respective premises modified so as to provide for a reasonable reduction in the fixed minimum rent and an increase in the additional rent payable to the lessors, to be represented by a larger percentage of the gross sales at the restaurant operated on the said premises, the effect of which would be to afford the landlords current rent at least as large and [fol. 30] probably larger than they were then entitled to receive under the existing leases as modified, yet would protect the tenant against unreasonably high rentals at times when business conditions were less favorable. Mr. Herbert Birrell at that time advised the Trustee's attorney in effect that he personally favored such a proposal, but he would be obliged to discuss the matter with his principals before an answer could be given. Within a week thereafter, the Trustee's attorney asked Mr. Herbert Birrell what the attitude of the lessors was with respect to said proposal. The Trustee's attorney was then advised that the attitude of the landlords of the premises toward said proposal would depend largely upon who would constitute the management of the Debtor upon its reorganization, that this was a vital aspect of any lease in which a percentage of gross sales constituted an important element of rent, that as it would necessarily take some time before the reorganization of the Debtor could be effected, the lessors would consider the proposal when the proceedings for reorganization had progressed further, that, therefore, there was no hurry in the matter, and that Mr. Herbert Birrell or his brother, Mr. Lowell Birrell, would subsequently get in touch with the Trustee's attorney in such connection. On information and belief, the petitioner was advised of said proposals and discussions.

9. On information and belief, petitioner intended that the Trustee should rely upon said statements; the Trustee in

fact did rely thereon, and, in consequence, did not at that time offer or take steps to assume said leases.

10. On information and belief, that in fact the petitioner, at the respective times said statements were made to the Trustee's attorney, intended to cancel his said lease and to enter into a new lease with other parties; that he had no [fol. 31] intention of entering into an agreement with the Trustee upon the basis of the above mentioned discussions or upon substantially such basis.

11. On information and belief, petitioner at the time of said conference and discussions with the Trustee's attorney, was negotiating a lease said premises to other parties, and desired that the Trustee should not either seek to assume or reject said lease or take action to that end until after petitioner's negotiations with the new proposed lessee should be consummated; and said statements were made to Trustee's attorney with the intent and purpose of inducing and causing the Trustee to take no such action until after the conclusion of petitioner's said negotiations with other parties.

12. On or about March 23, 1944, Trustee's attorney on his behalf advised Messrs. Lowell Birrel and Herbert Birrell that, in his opinion, the respective landlords of the premises at 1551 Broadway and 1553 Broadway had waived their right, if any, to cancel the leases upon said properties by virtue of the long period of time which had elapsed since the appointment of the Trustee without action on their part to cancel said leases. Nevertheless, and despite the further fact that the Trustee was appointed on August 26, 1943, no notice of cancellation or other notice purporting to cancel said lease of the premises at 1553 Broadway was given by petitioner until on or about June 23, 1944.

13. By virtue of the above facts, the petitioner has waived its right to exercise any option to cancel said lease and is estopped from so doing.

[fol. 32] Wherefore the Trustee requests that the petition herein be denied and dismissed.

John F. X. Finn, As Trustee of Childs Company, Debtor.

(Verified July 28, 1944.)

[By agreement among the parties hereto the testimony is omitted from the printed record.]

[fol. 33] PETITIONER-APPELLEE'S EXHIBIT 1

[Only pertinent portions of this Exhibit are printed herein pursuant to agreement with counsel.]

"Agreement made this 31st day of July, 1922 between Gramway Company, Inc., a domestic corporation having its principal place of business at 54 West Boston Post Road, in the Town of Mamaroneck, County of Westchester and State of New York, hereinafter referred to as "landlord" and Childs Company a domestic corporation having its principal place of business at No. 200 Fifth Avenue, Borough of Manhattan, City, County and State of New York, hereinafter referred to as "tenant," Witnesseth:

* * * * * * *

"Conditional Limitation

"4. The tenant covenants that if the rent reserved by this lease or any part thereof shall remain unpaid for more than ten days after written notice that it has become due or if the tenant shall fail to perform any of the covenants, conditions, provisions, and agreements herein contained, or, if a petition in bankruptcy shall be filed by the tenant or if the tenant shall be adjudged bankrupt or insolvent by any Court, or if a trustee in bankruptcy of the tenant shall be appointed in any suit or proceeding brought by or against the tenant, then and in each and every such case, the term hereby granted shall immediately cease, determine and come to an end, and the landlord may recover and resume possession of the demised premises by any legal means.

* * * * * * *

[fol. 34] "Recovery of Possession on Default

13. The tenant covenants that if the rent reserved by this lease, or any part thereof, shall remain unpaid for more than ten days after written notice that same has become due, or the tenant shall fail to perform any covenant, condition, provision or agreement herein contained or if a petition in bankruptcy shall be filed by the tenant or if the tenant shall be adjudged insolvent by any Court, or if a trustee in bankruptcy of the tenant, shall be appointed in any suit or proceeding by or against the tenant, or if the tenant

shall be dispossessed or if the demised premises shall become vacant or abandoned, the landlord may recover and resume possession of the demised premises by force or otherwise, without being liable to prosecution therefor. . . .

. . . . . .

[fol. 35] PETITIONER-APPELLEE'S EXHIBIT 3

To John F. X. Finn, As Trustee in Bankruptcy of Childs Company; c/ Lorenz, Finn & Lorenz, Esqs., Attorneys for Trustee, 165 Broadway, New York, N. Y.; Childs Company, 200 Fifth Avenue, New York, N. Y.

Please take notice that the term granted under and by virtue of a certain written lease dated July 31, 1922, made by Gramway Company Inc., as landlord, and Childs Company, as tenant, covering the premises known as 1553 Broadway, Borough of Manhattan, City, County and State of New York, and as modified in certain respects by an agreement dated March 23, 1942, has ceased, determined and come to an end by virtue of the bankruptcy proceedings now pending in the United States District Court, Southern District of New York, relating to the said Childs Company, the aforesaid tenant.

Please take further notice that Burton C. Meighan, Jr., as Substituted Trustee under the Last Will and Testament of William T. Wood, Deceased, as owner in fee of the said premises known as 1553 Broadway, New York City, and as successor to all of the rights and privileges of the said Gramway Company Inc. under and by virtue of the aforesaid lease, does hereby demand that you vacate the said premises at 1553 Broadway, New York City, and deliver possession thereof to the said Burton C. Meighan, Jr., as Substituted Trustee as aforesaid, forthwith.

[fol. 36] Please take further notice that the said Burton C. Meighan, Jr., as Substituted Trustee, as aforesaid, has leased the entire premises at 1553 Broadway, New York City, to a tenant desiring immediate possession of the said premises. In the event of your failure to comply with this demand resulting in loss or damage of any nature whatsoever to the said Burton C. Meighan, Jr., as Substituted

Trustee as aforesaid, proceedings will be instituted to recover for any and all said loss or damage.

Dated June 23, 1944.

Burton C. Meighan, Jr., As Substituted Trustee under the Last Will and Testament of William T. Wood, Deceased, Landlord.

[fol. 37] PETITIONER-APPELLEE'S EXHIBIT 4

Letterhead of

Meighan & Necarsulmer

Counselors at Law

120 Broadway

New York 5, N. Y.

June 1, 1944.

Mr. John F. X. Finn, As Trustee of The Childs Company, 165 Broadway, New York City, N. Y.

DEAR MR. FINN:

Re: William T. Wood Estate (Premises #1553 Broadway)

I have had before me for some time a letter from Mr. Joseph Lorenz indicating that you are desirous of assuming the lease of #1553 Broadway as modified by agreement dated March 23, 1942. This letter has been given careful consideration. In view of the bankruptcy the modified lease above referred to is no longer in effect.

As you know, I am under certain statutory disabilities as a testamentary trustee and in any event in connection with any new lease-relationship would be required to proceed under the applicable sections of the Real Property Law.

Furthermore, an investigation has convinced me that the fair rental value of the property is in excess of the net rental of $22,041.11.

I am this day in receipt of a letter signed in your name by Mr. LaBarre, Vice President of the Childs Company, [fol. 38] enclosing a check to my order in the sum of $10,-

775.08, together with a statement which purports to bring to date the obligations of the tenant under the modification agreement. In view of the circumstances above outlined I cannot retain the check and am therefore returning it to you herewith.

As a matter of courtesy, a copy of this letter is being sent to the Childs Company at its executive offices for the attention of Mr. LaBarre.

Faithfully yours, Burton C. Meighan, Jr.

enclosure.

PETITIONER-APPELLEE'S EXHIBIT 5

Letterhead of

Lorenz, Finn & Lorenz

165 Broadway

New York

July 6, 1944.

Barton C. Meighan, Jr., Messrs. Meighan & Necarsulmer, 120 Broadway, New York 5, N. Y.

DEAR MR. MEIGHAN:

Enclosed is a copy of letter which I have written Mr. Herbert Birrell, which is self-explanatory.

Very truly yours, Joseph Lorenz.

JL m.

[fol. 39] Letterhead of Lorenz, Finn & Lorenz, 165 Broadway, New York

July 6, 1944.

Re: 1551 Broadway, 1553 Broadway

Herbert A. Birrell, Esq., 545 Fifth Avenue, New York 17, N. Y.

DEAR MR. BIRRELL:

I acknowledge receipt of your letter of July 5th.

I do not believe that either you or your brother gave me any reason to misunderstand your relationship to the William W. Wood Estate or to its attorneys, nor did I

misunderstand it. I have at all times known that you do not legally represent the William T. Wood Estate, but that said estate is represented by Messrs. Meighan and Necarsulmer. It has been my understanding that the two landlords were naturally cooperating, and, I assumed that your firm, without committing the Wood Estate in any way, was expressing the joint views of the two landlords on the matters we have been discussing. I did, in fact, as I expressed to Mr. Meighan, have some hesitation in telephoning or calling him about the subject matter of our discussions in view of the fact that we had been talking only with your firm, and I did not wish to imply, by directly communicating with Mr. Meighan, that I had any doubt that you were accurately expressing his view point.

I repeat that no misunderstanding has existed on my part, nor do I believe that any harm whatsoever has been done, nor anyone's rights prejudiced. I am sending a copy of this letter to Mr. Meighan.

Very truly yours, sgd. Joseph Lorenz.

JL/m

[fol. 40] RESPONDENT'S-APPELLANT'S EXHIBIT "D"

Letterhead of Lorenz, Finn & Lorenz, 165 Broadway New York

May 9, 1944,

Re: Childs Company 1553 Broadway

Burton C. Meighan, Jr., c/o Messrs. Meighan & Necarsulmer, 120 Broadway, New York 5, N. Y.

DEAR MR. MEIGHAN:

The Trustee of Childs Company is desirous of assuming the lease at 1553 Broadway, as modified. I trust that this is satisfactory to your client and I would appreciate it, if at your convenience, you would communicate with me in connection with the details to consummate the assumption.

Very truly yours, Joseph Lorenz.

JL/m

[fol. 41]. In United States District Court

[Same Title]

Report of Special Master on Petition of Burton C. Meighan, Jr., Substituted Trustee Under the Last Will and Testament of William T. Wood, Deceased

To the Honorable Judges of the United States District Court for the Southern District of New York:

Robert P. Stephenson, duly appointed Special Master herein by order dated July 26, 1944, heard the evidence on the issues presented by the petition of Burton C. Meighan, Jr., Substituted Trustee under the Last Will and Testament of William T. Wood, Deceased, verified June 27, 1944 and the answer thereto by John F. X. Finn, trustee of the above named debtor verified July 28, 1944 and the arguments of counsel on August 3 and 4, 1944, and after due deliberation and the rendering of an opinion dated August 7, 1944 hereto annexed, respectfully reports as follows:

Findings of Fact

1. On July 31, 1922 the petitioner's predecessor in interest made a lease with Childs Company, which is in evidence and marked Petitioner's Exhibit 1.

2. The petitioner is the substituted trustee under the last will and testament of William T. Wood, deceased, and is the successor in interest to the landlord in said [fol. 42] lease, to the reversion of said lease, and all the rights of the original lessor therein.

3. On May 23, 1942, the petitioner and Childs Company entered into a modification which is in evidence and marked Petitioner's Exhibit 2.

4. On August 26, 1943, Childs Company, the debtor herein, filed its petition for reorganization under Chapter X of the Bankruptcy Act, and in such petition stated that it is unable to pay its debts as they mature.

5. On August 26, 1943, the judge entered an order approving said petition.

6. On August 26, 1943, John F. X. Finn was appointed trustee of the debtor in said proceeding. He took pos-

session and now has possession of the premises covered by the aforesaid lease and has been paying to the petitioner from time to time sums on account of use and occupation with the stipulation that none of such payments should affect the rights or liabilities of either party.

7. From about December 6, 1943 until shortly after January 28, 1944, the trustee through his attorney was negotiating with the attorneys for an adjoining landlord, whose name is The 415 Fifth Avenue Corporation. The discussion in these negotiations covered the making of new leases. The attorneys for The 415 Fifth Avenue Corporation had at times suggested that their client might make a lease with the trustee with substantially the same terms as the lease then existing and as modified, and the trustee offered to make a new lease which should provide for a smaller net cash paym , but a larger percentage payment on gross sales.

[fol. 43] 8. One of the attorneys for The 415 Fifth Avenue Corporation told the attorney for the trustee within the next few days after January 28, 1944, that the character of the new management of the Childs Company, should there be a reorganization, was an important element to consider whether or not a lease might be accepted where a large part of the rental depended upon the earnings, and that that could not be known for some time, and that there was no hurry. Such statement by the attorney for The 415 Fifth Avenue Corporation to the attorney for the trustee was not known to this petitioner.

9. The petitioner did not authorize Birrell and Birrell or either one of them to act for him in this matter, nor did he represent or hold out to the trustee or to anyone representing the trustee that Birrell and Birrell or either one of them was authorized to act for him.

10. The petitioner did not authorize The 415 Fifth Avenue Corporation, H. Adams Ashforth, or Albert B. Ashforth, Incorporated to act for him in this matters nor did he hold out to the trustee or anyone in the trustee's behalf that any of those parties was so authorized.

11. On May 9, 1944, the attorney for the trustee sent a letter to the petitioner which is in evidence and marked Trustee's Exhibit D.

12. By this letter the attorney for the trustee meant by the expression that the trustee is desirous of assuming the lease of 1553 Broadway as modified that the trustee desired to make a new lease with the petitioner, which shall have substantially the same terms as Petitioner's Exhibit 1 in this case as modified by Petitioner's Exhibit 2.

[fol. 44] 13. This letter was not answered by the petitioner until June 1, 1944, when he wrote Petitioner's Exhibit 4, addressed to the trustee in this reorganization proceeding.

14. On June 23, 1944, the petitioner sent Petitioner's Exhibit 3 by registered mail to the trustee, John F. X. Finn, and to the Childs Company, the debtor, and said exhibit was received by each of said parties on that date or the day following.

15. On July 6, 1944, the attorney for the trustee sent to the petitioner Exhibit 5.

CONCLUSIONS OF LAW

16. The term for years granted under Exhibit 1 came to an end and terminated on August 26, 1943.

17. The petitioner is entitled to the relief prayed for.

Respectfully submitted, R. P. Stephenson, Special Master.

Dated: New York, N. Y., August 7, 1944.

[fol. 45] [Same Title]

OPINION OF SPECIAL MASTER ON PETITION OF BURTON C. MEIGHAN, JR., SUBSTITUTED TRUSTEE UNDER THE LAST WILL AND TESTAMENT OF WILLIAM T. WOOD, DECEASED

Petition of Burton C. Meighan, Jr., Substituted Trustee under the Last Will and Testament of William T. Wood, Deceased, for an order adjudging that the term granted by a certain lease is terminated and to direct the trustee forthwith to surrender possession of the premises involved. The answer of the trustee denies certain allegations of the petition and contains an affirmative defense which at the trial was amended so that paragraph number 13 thereof should read as follows:

"13. By virtue of the above facts, the petitioner has waived the provision in said lease purporting to

terminate the same and is estopped from asserting that the lease is terminated."

Meighan & Necarsulmer, Esqs., Louis A. Marchisio, Esq., Of counsel. For the petitioner.

Lorenz, Finn & Lorenz, Esqs., Joseph Lorenz, Esq., Of counsel. For the trustee.

Marshall, Bratter & Seligson, Esqs., Harold P. Seligson, Esq., Of counsel. For Childs Debenture Holders Committee.

[fol. 46] Stephenson, Special Master:

I will deal briefly in this opinion with the contentions of the parties on the law applicable to the facts in this case. The trustee contends that a literal construction of paragraph 4 of the lease is harsh and was not what the parties intended. There is much in the trustee's contention. The words used mean what the parties intended them to mean, though such meaning is not literally correct. Paragraph 4 enumerates a number of events which shall end the term of the lease. In stating that the term shall come to an end if the rent shall remain unpaid for more than ten days after written notice, the parties intended to mean a failure to pay for such ten days or a reasonable time thereafter if accepted by the landlord: that is the substance of the meaning in the actual facts of business transactions. The provision that the term shall came to an end if the tenant shall fail to perform any of the covenants, provisions, conditions or agreements contained means that if he shall substantially fail to an extent which might be injurious to the landlord. The provision that if a petition in bankruptcy shall be filed by the tenant or if the tenant shall be adjudged a bankrupt or insolvent by any court, means exactly what it says: for such events are, in and of themselves, of substantial importance to the landlord and to the tenant. The filing of a petition in bankruptcy by the tenant is an event which substantially affects not only temporarily, but for some time the ability of the tenant to meet its obligations under the lease. Adjudging a tenant a bankrupt likewise is a substantial and important matter. The adjudgment by a court that the bankrupt is insolvent (unable to pay its debts as they mature) is a substantial and

important matter to the landlord: for it substantially and materially affects the ability of the tenant to pay and to continue to pay during the balance of the term the rent [fol. 47] that may be due. The trustee contends that the word "insolvent" following the word "bankrupt" means insolvent in the bankruptcy sense. If this were an entirely new question, I would say there is much force in the trustee's argument, but that question has been decided by higher courts in cases that are substantially not any different from this one and I am bound to follow such decisions. The court held in re *Schulte Retail Stores Corporation*, 22 F. (Supp.) 612 that the word "insolvent" in a lease made in 1920 meant insolvent, not as defined in the Bankruptcy Act, but an inability to meet obligations as they mature. A similar decision was made as to the meaning of "insolvent" in re *Willow Cafeterias*, 95 F. (2nd) 306 and in re *Walker*, 93 F. (2nd), 281.

On August 26, 1943 the debtor filed a petition praying for relief under Chapter X of the Bankruptcy Act, and in such petition stated that it is unable to pay its debts as they mature. The Judge entered an order approving said petition. This is an adjudication that the debtor is unable to pay its debts as they mature. The Judge can only enter such an order if "satisfied that it" (the petition) "complies with requirements of this chapter" (Section 141). One of the requirements of the Chapter is that the petition shall state either that the debtor is insolvent or unable to pay its debts as they mature (Section 130). Therefore, the entering of an order approving the petition is an adjudication by the court that the debtor is unable to pay its debts as they mature. I must find that the tenant has been adjudged insolvent by a Court, and that on August 26, 1943, the date of the entry of the order approving the petition, this term came to an end.

The Trustee has the right to assume executory contracts, and with the permission of the judge to reject them (Section 116(1)). If the trustee assumed such contract, he would be assuming a contract without a term. Of [fol. 48] course he could do so, but it is not very likely he would, because he would then have liabilities and no rights.

This petitioner knew that there were negotiations with the adjoining landlord, and waited to see what would happen. He did no negotiating with the trustee, nor did he

authorize anyone to negotiate with the trustee: however, he stood by ready to accept anything which he thought might be advantageous.

Even if he could waive the termination of the lease, he did not do so. Furthermore, I do not see how he could waive termination if the effect of such waiver was to create a new lease. The term being an at an end, he cannot create a term for a longer period than a year except in writing signed by the party to be charged, and there was no writing in this case by any party to be charged.

Now, was there an estoppel? It is possible to create an interest in real estate by an estoppel. I do not believe that anything short of actual fraud or the conveying of property which a person doesn't have and later acquiring it can create an estoppel. I think there is no evidence of either in this case.

Dated: New York, N. Y., August 7, 1944.

[fol. 49] In United States District Court

[Same Title]

Objections to Special Master's Report on Petition of Burton C. Meighan, Jr., Substituted Trustee under the Last Will and Testament of William T. Wood, Deceased, With Respect to the Premises 1553 Broadway, New York, N. Y.

John F. X. Finn, Trustee of the above named Debtor, objects to the report of Hon. Robert P. Stephenson, Special Master herein, dated August 7, 1944, in the following particulars:

1. The conclusion of law (No. 16) that "the term for years granted under Exhibit 1 came to an end and terminated on August 26, 1943," is contrary to the evidence and is erroneous as a mater of law.

2. The conclusion of law (No. 17) that "the petitioner is entitled to the relief prayed for" is contrary to the evidence, and is erroneous as a matter of law.

Dated, New York, N. Y., September 27, 1944.

Lorenz, Finn & Lorenz, Attorneys for Trustee-Objector, 165 Broadway, New York N. Y.

[fol. 50] IN UNITED STATES DISTRICT COURT

[Same Title]

NOTICE OF MOTION TO CONFIRM REPORT OF SPECIAL MASTER

SIRS:

Please take notice that Burton C. Meighan, Jr., as Substituted Trustee under the Last Will and Testament of William T. Wood, Deceased, the owner in fee and landlord of premises known as and by 1553 Broadway, New York City, and as such the petitioner herein, will move this Court on the 23rd day of August, 1944, at ten thirty o'clock in the forenoon, or as soon thereafter as counsel can be heard, at the United States Court House, Foley Square, Borough of Manhattan, City of New York, Room 506, for an order confirming the report of Robert P. Stephenson, Esq., Special Master, filed herein on the 7th day of August, 1944, and adopting the findings of fact and conclusions of law of the said Special Master as the findings of fact and conclusions of law of this Court, and for such other and further relief as to this Court may seem proper and just in the premises.

Dated: New York City, August 10, 1944.

Yours, etc. Meighan & Necarsulmer, Attorneys for Petitioner, By Burton C. Meighan, Jr., Member of said firm, Office and P. O. Address, No. 120 Broadway, Borough of Manhattan, City of New York.

[fol. 51] To Lorenz, Finn & Lorenz, Esqs., Attorneys for John F. X. Finn, Trustee of Childs Company, 165 Broadway, New York, N. Y. And all other Parties in Interest.

In United States District Court, Southern District of New York

[Same title]

In re: Lease on 1553 Broadway, New York City

Petition of Burton C. Meighan, Jr., Substituted Trustee under the Last Will and Testament of William T. Wood, Deceased.

Opinion

Edward A. Conger, U. S. D. J.:

The Petitioner herein Burton C. Meighan, Jr. as substituted Trustee under the Last Will and Testament of William T. Wood, Deceased (Landlord) has petitioned this Court for an order adjudging that the term granted by and under a certain lease has terminated.

Petitioner is the Landlord of certain premises known as No. 1553 Broadway, New York City. The Debtor Childs Company has been occupying and using said premises, in connection with another property at No. 1551 Broadway, as a restaurant.

[fol. 52] Debtor's occupancy was pursuant to a lease which expired by its terms on April 30, 1947, with an option to renew, under certain terms and conditions, for a further period of 21 years.

On or about August 26, 1943 the Childs Company filed its petition herein for reorganization under Chapter X of the Bankruptcy Act. On the same day this Court approved the petition and appointed John F. X. Finn, Trustee of the Debtor; thereupon the said Trustee took possession of said premises and has been in possession and control of said premises ever since, as such Trustee.

The original lease contained the following provisions:

"4. The Tenant covenants that * * * if a petition in bankruptcy shall be filed by the tenant or if the tenant shall be adjudged bankrupt or insolvent by any Court, or if a trustee in bankruptcy of the tenant shall be appointed in any suit or proceeding brought

by or against the tenant, then and in each and every case, the term hereby granted shall immediately cease, determine and come to an end, and the landlord may recover and resume possession of the demised premises by any legal means."

"Recovery of Possession in Default

"13. * * * if a petition in bankruptcy shall be filed by the tenant or if the tenant shall be adjudged insolvent by any Court or if a Trustee in Bankruptcy of the tenant shall be appointed in any suit or proceeding by or against the tenant * * * the landlord may recover and assume possession of the demised premises by force or otherwise without being liable to prosecution therefor."

Petitioner, contending that the filing and approval of the Petition for reorganization is within the prohibition [fol. 53] of the above clauses and constituted a breach of the terms of the lease, asks that it be decreed that the lease has terminated and that Debtor and the Trustee be ordered to surrender the premises to Petitioner. The petition duly came before me. The Trustee denied certain material allegations of the petition and set up an affirmative defense of waiver of the right to cancel the lease on Petitioner's part.

I referred the whole matter to Robert P. Stephenson, as Special Master to hear and report. The Special Master heard the evidence on the issues presented and has handed down his Findings of Fact and Conclusions of Law, together with an opinion.

The Special Master has found against the debtor and in favor of Petitioner.

Petitioner has now moved to confirm the Report of the Special Master. The Trustee objects to the confirmation of the report and its adoption by this Court.

The Trustee's sole contention is that the filing of the Petition in Chapter X and its approval was not a violation of the terms of the lease.

The issue presented is a pure legal question. I realize that forfeitures are not favored by the Courts, but I have come to the conclusion that legally Petitioner is correct in his contention.

I agree in the main with the opinion of the Special Master.

The Trustee insists that the word "insolvent" as used in Paragraph 4 of the lease means insolvent in the Bankruptcy sense. *The sentence to* be construed reads: "or if the tenant *shall be adjudged bankrupt or insolvent by any court.*" The Trustee urges that the position of the words "bankrupt or insolvent" indicates that the draftsman of the instrument intended the two words to be synonymous. He urges that the word "insolvent" in Paragraph 4 follows language which concerns itself solely with bank-[fol. 54] ruptcy and that the phrase following concerns itself solely with bankruptcy. The Trustee contends that the construction rule of "ejusdem generis" applies. At first blush it would appear as though there might be some merit in the Trustee's argument.

I think however, his argument is too finely spun. When the Petition was approved it was adjudicated as to the debtor that "it was unable to pay its debts as they mature." It has been held that the word "insolvent" in a lease in a similar clause, as found here, means an inability to meet obligations as they mature.

Schulte Retail Stores Corporation, 22 Fed. Supp. 612 Affirmed;
In re Walker, et al., 98 Fed. (2) 281;
In re Wil-Low Cafeterias, Inc., 95 Fed. (2) 306.

In *In re Walker, supra*, we find the following pertinent language on page 283:

> "The insolvency mentioned in the lease cannot have been other than a failure to meet the lessee's obligations as they matured; that is the insolvency which throws the lessor's relations into confusion, delays payment of the rent, impounds his property for an indefinite time and in general makes it important for him to be free to reenter."

It should be noted that the lease was a New York contract. This is important in determining what the intention of the parties was. Certainly the words "*insolvent in any court*" indicate that the parties must have had in mind insolvency as defined by the laws of the State of New York (an inability to meet obligations as they mature) and not

insolvency in bankruptcy. Certainly the words "in any court" would seem to indicate that in the minds of the parties there was an intention to include within the bounds [fol. 55] of the clause of the lease a financial condition not measured by the rule of Federal Bankruptcy as exercised in the Federal Courts.

I agree with Judge Knox (Schulte Retail Stores Corporation, supra). "Hence, 'insolvent' must be taken to apply to situations not precisely within the purview of a bankruptcy proceeding * * * and inability to meet obligations as they matured was just such a situation."

The Report of the Special Master is confirmed and his Findings of Fact and Conclusions of Law adopted, as the Findings of Fact and Conclusions of Law of this Court.

The relief asked for in the petition herein is granted.

Settle order on five days' notice.

Edward A. Conger, United States District Judge.

Dated September 18, 1944.

[fol. 56] In United States District Court, Southern District of New York

[Same Title]

Order Confirming Report of Special Master In re Premises 1553 Broadway, New York, N. Y.

The petition of Burton C. Meighan, Jr., as substituted trustee under the last will and testament of William T. Wood, deceased, verified June 27, 1944, praying for an order adjudging that the term granted to Childs Company, the Debtor herein, by an indenture of lease dated July 31, 1922, as modified in certain respects by an agreement dated March 23, 1942, has terminated and come to an end and authorizing and directing the said debtor and John F. X. Finn, trustee of said debtor, to forthwith surrender possession of premises known as and by 1553 Broadway, New York City, to said petitioner, having duly and regularly come on to be heard on July 25, 1944, and due notice of said application having been given as prescribed by this Court by its order to show cause dated July 6, 1944, and the issues of fact raised by said petition and the an-

swering affidavit of Joseph Lorenz, sworn to July 24, 1944, and the affidavit of John F. X. Finn, trustee of the said debtor, sworn to July 24, 1944, and the affidavit of Kenneth LaBarre, sworn to July 24, 1944, having been referred to the Honorable Robert P. Stephenson, as Special Master, to hear the proofs and arguments of the parties and to report his findings of fact and conclusions of law thereon to this Court with all convenient speed pursuant to an order of this Court dated July 26, 1944, and the report of the said Special Master having been duly filed herein on August 7, 1944, and the petitioner herein having duly moved this Court for an order confirming the said report of Honor-
[fol. 57] able Robert P. Stephenson, Special Master, and adopting the findings of fact and conclusions of law of the Special Master as the findings of fact and conclusions of law of this Court, and after hearing Meighan & Necarsulmer, Esqs., attorneys for Burton C. Meighan, Jr., as Substituted Trustee as aforesaid, in support of the aforesaid application and Lorenz, Finn & Lorenz, attorneys for the Trustee of the debtor herein, and Marshall, Bratter & Seligson, attorneys for Protective Committee, etc., in opposition thereto, and due deliberation having been had thereon, and the opinion of this Court having been filed herein;

Now, upon the petition of Burton C. Meighan, Jr., as Substituted Trustee as aforesaid, the answer of John F. X. Finn, as Trustee of Childs Company, debtor, verified July 28, 1944, the report and opinion of Honorable Robert P. Stephenson, as Special Master, and the testimony taken upon the hearings before said special master, the exhibits and all other papers filed and proceedings had in connection with the said petition and hearing, it is

Ordered that the said report of Honorable Robert P. Stephenson, as Special Master, be and the same hereby is confirmed in all respects and the findings of fact and conclusions of law contained therein are hereby adopted as the findings of fact and conclusions of law of this Court, and it is further

Ordered, that the term for years granted Childs Company by a certain indenture of lease dated July 31, 1922, and as modified in certain respects by an agreement dated March 23, 1942, covering the premises known as and by 1553 Broadway, Borough of Manhattan, New York City, came to an end and terminated on August 26, 1943, and that

[fol. 58] the Childs Company, the debtor herein, and John F. X. Finn, trustee of the said debtor, be and they hereby are authorized and directed to surrender possession of said premises within thirty (30) days from September 27, 1944 to Burton C. Meighan, Jr., as Substituted Trustee under the Last Will and Testament of William T. Wood, deceased, and to remove from the said premises all property of the said debtor and the debtor's trustee, except fixtures and other articles of personal property attached to the building on the premises constituting a part of the realty or becoming the property of the petitioner under and pursuant to the terms of the aforesaid indenture of lease.

Dated, September 27th, 1944.

Edward A. Conger, U. S. D. J.

(Filed in the office of the Clerk on October 2, 1944.)

[fol. 59] In United States District Court

[Title omitted]

Notice of Appeal in re Premises 1553 Broadway, New York, N. Y.

Sirs:

Notice is hereby given, that John F. X. Finn, as Trustee of Childs Company, the above named Debtor, hereby appeals to the Circuit Court of Appeals for the Second Circuit from the Order of the United States District Court for the Southern District of New York, granting the petition of Burton C. Meighan, Jr., as Substituted Trustee under the Last Will and Testament of William T. Wood, Deceased, verified June 27, 1944, and directing that the Childs Company, Debtor herein, and John F. X. Finn, as Trustee of said Debtor, surrender possession of the premises known as 1553 Broadway, New York, N. Y., to the aforesaid Burton C. Meighan, Jr., as said Substituted Trustee, which Order was entered in this proceeding on October 2nd, 1944.

Dated, October 3rd, 1944.

Lorenz, Finn & Lorenz, By Joseph Lorenz, Attorneys for Appellant, John F. X. Finn, as Trustee of Childs Company, 165 Broadway, New York, N. Y.

[fol. 60] To Meighan & Necarsulmer, Esqs., Attorneys for Appellee, Burton C. Meighan, Jr., as Substituted Trustee under the Last Will and Testament of William T. Wood, Deceased, 120 Broadway, New York, N. Y.

Birrell & Birrell, Esqs., Attorneys for The 415 Fifth Avenue Company, Inc., 545 Fifth Avenue, New York, N. Y.

And all other Parties in Interest.

[fol. 61] In United States District Court

[Same Title]

Stipulation as to Record

It is Hereby Stipulated and Agreed that the foregoing is a true copy of the transcript of the record of the said District Court for the Southern District of New York, in the above entitled matter as agreed upon by the parties.

Dated, New York, N. Y., November 29, 1944.

Meighan & Necarsulmer, Attorneys for Burton C. Meighan, Jr., as Substituted Trustee under the Last Will and Testament of William T. Wood, Deceased, Appellee; Lorenz, Finn & Lorenz, Attorneys for John F. X. Finn, as Trustee of Childs Company, Appellant.

[fol. 62] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 63] UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT, OCTOBER TERM, 1944

No. 206

(Argued December 7, 1944. Decided December 28, 1944).

BURTON C. MEIGHAN, JR., as Substituted Trustee under the Last Will and Testament of William T. Wood, Deceased, Petitioner-Appellee,

against

JOHN F. X. FINN, as Trustee of Childs Company, Respondent-Appellant

Before Swan, Augustus N. Hand and Chase, Circuit Judges

Appeal from the District Court of the United States for the Southern District of New York

Proceedings for reorganization of Childs Company under Chapter X of the Bankruptcy Act. From an order therein adjudging that a lease held by the debtor came to an end on August 26, 1943, and directing that the debtor's trustee surrender possession to the lessor, said trustee has appealed. Affirmed.

[fol. 64] Lorenz, Finn & Lorenz, attorneys for appellant; Joseph Lorenz, of counsel.

Meighan & Necarsulmer, attorneys for appellee; Burton C. Meighan, Jr., and Louis A. Marchisio, of counsel.

SWAN, Circuit Judge:

This appeal involves a lease on 1553 Broadway in which the debtor conducts a restaurant in connection with the adjacent premises involved in the companion appeal decided herewith under the title of The 415 Fifth Avenue Company, Inc. v. Finn. The lease now under consideration was made in 1922 for a term of years expiring April 30, 1947. It contains provisions by virtue of which the lessor contends that the term came to an end on August 26, 1943. On that date the lessee filed its petition for reorganization and in such petition stated that it is unable to pay its debts as they mature. On the same date the court approved the petition and appointed the appellee as the debtor's trustee. On June

23, 1944 the lessor gave written notice to the debtor's trustee that the lease "has ceased, determined and come to an end by virtue of the bankruptcy proceedings now pending * * * relating to the said Childs Company." This was followed by the lessor's petition upon which the court adjudged that the lease did terminate on August 26, 1943. The provisions of the lease relevant to that decision read as follows:

"Conditional Limitation

4. The tenant covenants that if the rent reserved by this lease or any part thereof shall remain unpaid for more than ten days after written notice that it has become due or if the tenant shall fail to perform any [fol. 65] of the covenants, conditions, provisions, and agreements herein contained, or, if a petition in bankruptcy shall be filed by the tenant or if the tenant shall be adjudged bankrupt or insolvent by any Court, or if a trustee in bankruptcy of the tenant shall be appointed in any suit or proceeding brought by or against the tenant, then and in each and every such case, the term hereby granted shall immediately cease, determine and come to an end, and the landlord may recover and resume possession of the demised premises by any legal means.

* * * * * * *

Recovery of Possession on Default

13. The tenant covenants that if the rent reserved by this lease, or any part thereof, shall remain unpaid for more than ten days after written notice that same has become due, or the tenant shall fail to perform any covenant, condition, provision or agreement herein contained or if a petition in bankruptcy shall be filed by the tenant or if the tenant shall be adjudged insolvent by any Court, or if a trustee in bankruptcy of the tenant shall be appointed in any suit or proceeding by or against the tenant, or if the tenant shall be dispossessed or if the demised premises shall become vacant or abandoned, the landlord may recover and resume possession of the demised premises by force or otherwise, without being liable to prosecution therefor. * * *"

The sole issue presented by this appeal is whether the district court was correct in construing the clause "if the tenant shall be adjudged bankrupt or insolvent by any court" to apply to the order of the bankruptcy court approving the debtor's petition in reorganization and appointing a trustee. The appellant contends that "insolvent" as used in paragraph 4 of the lease refers to insolvency in the [fol. 66] bankruptcy sense, that is, to an excess of liabilities over assets rather than an inability to meet obligations as they mature. But such a construction would deprive the words "or insolvent by any court" of all utility; they would add nothing to the preceding words "adjudged bankrupt." Moreover in paragraph 13 the phrase "or if the tenant shall be adjudged insolvent by any court" is treated as a condition distinct and different from the filing by the tenant of a petition in bankruptcy, or from the appointment of a trustee in bankruptcy in any suit or proceeding by or against the tenant. In construing a contract the court should adopt a construction, if reasonable, which gives meaning to every word the parties use. Since the time-honored meaning of insolvency, in the absence of a statute specifying another meaning, is inability to meet obligations as they mature in ordinary course of business, it is entirely reasonable to suppose that the parties used "insolvent" in that sense rather than in the limited sense already covered by "adjudged bankrupt." *In re Wil-low Cafeterias, Inc.*, 22 F. Supp. 617, 619, Rev'd on another ground, 95 F. 2d 306 (C. C. A. 2), cert. den. 304 U. S. 567; *In re Schulte Retail Stores Corp.*, 22 F. Supp. 612 aff'd, *In re Walker*, 93 F. 2d 281 (C. C. A. 2); *Model Dairy Co., Inc.* v. *Foltis-Fischer, Inc.*, 67 F. 2d 704 (C. C. A. 2). It is true, as appellant urges, that in these cases the forfeiture clauses were more detailed than is the clause now under consideration; and it is likewise true, as was said in the *Model Dairy* opinion, *supra*, that such clauses are not viewed with "a friendly eye." But we do not think the rule of strict construction would justify reading all meaning out of the words which follow, "adjudged bankrupt," in paragraph 4 of the lease. "* * * We must give effect to the fair meaning of the language used." *Model Dairy* case, *supra*, at page 706. The order is affirmed.

[fol. 67] UNITED STATES CIRCUIT COURT OF APPEALS, SECOND CIRCUIT

At a Stated Term of the United States Circuit Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the 18th day of January one thousand nine hundred and forty-five.

Present: Hon. Thomas W. Swan, Hon. Augustus N. Hand, Hon. Harrie B. Chase, Circuit Judges.

In the Matter of

CHILDS COMPANY, Debtor, BURTON C. MEIGHAN, JR., etc., Appellee,

JOHN F. X. FINN, as Trustee, etc., Appellant

Appeal from the District Court of the United States for the Southern District of New York

This cause came on to be heard on the transcript of record from the District Court of the United States for the Southern District of New York, and was argued by counsel.

On Consideration Whereof, it is now hereby ordered, adjudged, and decreed that the order of said District Court be and it hereby is affirmed with costs.

It is further ordered that a Mandate issue to the said District Court in accordance with this decree.

Alexander M. Bell, Clerk.

[fols. 68-69] [Endorsed:] United States Circuit Court of Appeals, Second Circuit. In re Childs Company, Debtor, Burton C. Meighan, Jr., etc., Appellee, John F. X. Finn, as Trustee, etc., Appellant. Order for Mandate. United States Circuit Court of Appeals, Second Circuit. Filed Jan. 18, 1945. Alexander M. Bell, Clerk.

[fol. 70] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed March 5, 1945

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit is granted, and the case is transferred to the summary docket. Counsel are requested to discuss in their briefs and upon oral argument the question whether the construction of the contract is governed by federal or state law.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Endorsed on Cover: Enter Joseph Lorenz, File No. 49,406. U. S. Circuit Court of Appeals, Second Circuit. Term No. 953. John F. X. Finn, as Trustee of Childs Company, Petitioner, vs. Burton C. Meighan, Jr., as Substituted Trustee under the last will and testament of William T. Wood, Deceased. Petition for a writ of certiorari and exhibit thereto. Filed February 17, 1945. Term No. 953 O. T. 1944.